



INTERIOR BOARD OF INDIAN APPEALS

Estate of Donald Isburg

59 IBIA 101 (08/20/2014)



According to the inventory attached to the Decision, the Indian trust real property owned by Decedent as of the date of his death consisted of the following allotments located on the Crow Creek Reservation: CC-37a, CC-97, CC-98, and CC-882. *Id.*

The Acting Regional Director (Regional Director), Great Plains Region, in a memorandum to the Superintendent, Crow Creek Agency (Superintendent), dated July 18, 2003, forwarded patents in fee issued to, as relevant to this appeal, Audrey and Clinton. *See* Supplement to the Record (rec'd Aug. 17, 2012). The patents in fee as described in the memorandum included all<sup>2</sup> of the trust real property from Decedent's Indian trust estate that had been inherited by and distributed to Audrey and Clinton, and establish that such property has passed out of trust status. *See id.*

In 2010, Appellant requested reopening of Decedent's estate, asserting that she is a child of Decedent, and should "be listed as an heir on my father's original probate." AR Tab 21.<sup>3</sup> In a separate letter to the IPJ dated June 29, 2010, the Superintendent asked, on behalf of Appellant, that Decedent's estate be reopened to include Appellant as an heir. AR Tab 19. The letter included a copy of a birth certificate and DNA test results, which the Superintendent cited as evidence that Decedent is the natural father of Appellant. *Id.*

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<sup>2</sup> The Regional Director's memorandum does not make specific reference to Crow Creek Allotment "37a" which describes a mineral and surface interest, but includes references to allotments "32" and "M32," identifying the original allottee for the allotments as "William Carpenter." The legal descriptions given for Allotments 32 and M32 are identical in substance to the legal descriptions given in the inventory attached to the Decision for Crow Creek Allotment 37a. Based on the legal descriptions given for Allotments 32 and M32 referenced in the Regional Director's memorandum, the Board concludes, for purposes of this decision, that the interests described for allotment "CC 37a" are the interests referred to as Allotments 32 and M32, and that fee patents were issued to Audrey and Clinton for the mineral and surface interests described as "CC 37a" in the inventory attached to the Decision. Any dispute concerning the inventory of Decedent's estate would be a matter to present to BIA, not to a probate judge or to the Board in a probate proceeding. *See* 43 C.F.R. § 30.128.

<sup>3</sup> Appellant's interest in reopening Decedent's probate case appears to have been prompted in part by her interest in being named an heir in state probate proceedings involving Decedent's sister, Lorraine Isburg Flaw. *See Estate of Flaws*, 811 N.W.2d 749 (S.D. 2012). Appellant apparently obtained a Crow Creek Sioux Tribal Court order declaring that Decedent was her father, but under South Dakota probate law, that did not suffice to establish parentage *for purposes of intestate succession* in Lorraine's (nontrust) state court probate proceeding. *Id.* at 752-54.

The IPJ issued an Order to Show Cause on June 28, 2011, informing interested parties that if the petition for reopening were granted, it would result in the addition of Appellant and Tamara Sue Isburg (Thayer) (Allen)<sup>4</sup> as children of Decedent. AR Tab 16.

On April 5, 2012, the IPJ denied reopening on the basis of information provided by the Regional Director that the interests inherited by Audrey and Clinton from Decedent's trust estate had gone out of trust into fee status. AR Tab 6. The IPJ found that proper grounds for reopening had not been shown because the Department no longer had probate jurisdiction over real property that had gone out of trust status, and thus lacks authority to redistribute Decedent's estate, i.e., based on a redetermination of heirs. *Id.* at 2 (citing *Estate of James Byron Granbois*, 53 IBIA 252 (2011)).

On appeal, Appellant argues that the IPJ's denial of reopening on jurisdictional grounds should be reversed, and Appellant also asserts various arguments for why reopening is warranted, including her lack of notice of the original proceedings and the paternity evidence she presented. Notice of Appeal, May 2, 2012; Appellant's Opening Brief (Opening Br.), Oct. 9, 2012, at 4-9. Because the Board concludes, however, that the Department no longer has jurisdiction over any of the property that was included in Decedent's estate, our decision addresses only the arguments raised by Appellant on the issue of jurisdiction.

### Discussion

Appellant bears the burden of showing on appeal that it was error for the IPJ to deny reopening. *Estate of Reginald Dennis Birthmark Owens*, 45 IBIA 74, 78 (2007).

In her notice of appeal, Appellant asserts that the IPJ failed to consider the fact that "a majority interest in property included in the original 1981 probate order remains in restricted status . . . ." Notice of Appeal at 2 (unnumbered). As we understand her argument, Appellant is asserting that because Decedent did not own a 100% interest in allotments identified in the estate inventory, and interests in the allotments owned by others remain in trust, the Department still has jurisdiction over the *allotment* and thus may assert probate jurisdiction in these proceedings in order to determine the paternity issue presented by Appellant in the reopening proceedings. She further asserts that the Department had jurisdiction in 1981 to determine the heirs to Decedent's trust estate, citing 25 U.S.C. § 372, which authorizes the Department to ascertain the legal heirs of Decedent. Appellant argues:

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<sup>4</sup> Tamara also submitted a request to the IPJ that Decedent's estate be reopened on the basis that she is a child and omitted heir of Decedent. Tamara, however, has not appealed the IPJ's denial of reopening.

The jurisdictional prerequisites for determination of heirship—an Indian with an allotment of land in trust, who dies before the expiration of the trust period and before the issuance of a fee simple patent—are as true today as they were in 1981.

Opening Br. at 6. Thus, as we understand Appellant’s argument, once the Department’s probate jurisdiction attaches, as was the case in 1981, it continues for purposes of reconsidering the heirship issue, separate and apart from any further probate, i.e., redistribution, of estate property. *See id.* at 5.

Appellant’s arguments misapprehend the limited scope of the Department’s authority to decide factual issues in the probate of Indian estates. It is the presence of trust property in the estate inventory of a deceased Indian, i.e., trust property that the decedent owned at the time of death, which gives rise to the authority of the Department to determine heirship. *See Estate of Marvin Lee Tissidimit*, 51 IBIA 211, 212 (2010) (“The [Department] only has probate jurisdiction over trust or restricted property of an Indian decedent. *See* 43 C.F.R. § 30.102(a); *see also id.* § 30.100 (“*Estate* means the trust or restricted land and trust personalty owned by the decedent at the time of death.”)) A Departmental probate judge is vested with authority to make a variety of determinations as part of a probate proceeding, but that authority—that jurisdiction—is ancillary to and dependent upon having an estate—property that constitutes the *res*—over which to assert probate jurisdiction. *See Estate of Bertha Mae Tabbytite*, 57 IBIA 80, 89 (2013) (“The *estate* is the *res* that is the subject of the probate *case*.”). If there is no trust property remaining in the estate of a deceased Indian, as is the case here, there is no authority for the Department to reopen the probate case, and thus no jurisdictional foundation upon which to determine heirship.<sup>5</sup> It makes no difference that other interests in the allotments—interests not owned

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<sup>5</sup> Past decisions of the Board, e.g., *Estate of Edward (Agopetah) Bert*, 12 IBIA 253 (1984), and *Estate of Joseph Dupoint*, 13 IBIA 6 (1984), allowed the reopening of closed Indian estates when reopening was sought for the sole purpose of determining nationality or Indian status, and not for the purpose of altering the distribution of a decedent’s estate. The Board, however, subsequently overruled these decisions in *Estate of Duke Hawley Tsoodle, Sr.*, recognizing:

[T]he Board’s rulings in *Bert* and *Dupoint* have led to a situation in which Departmental probate proceedings are invoked for purposes entirely unrelated to the probate of trust property. . . . [T]here is a serious question as to whether the Department’s [ALJs] have jurisdiction to make paternity determinations when those determinations are sought only for the purpose of eligibility for tribal membership. . . .

. . . .

(continued...)

by Decedent—remain in trust, because it is *Decedent's* interests, not the allotments as a whole, that are probated in his probate case. Because none of the interests that were part of Decedent's estate remain in trust, there is no jurisdiction for the IPJ or the Board to rule on the issue of whether Appellant is a child and heir of Decedent.

Appellant argues next that the IPJ's reliance on *Granbois* is misplaced because the petition in that appeal asked for a redistribution of property that had already passed out of trust, whereas the present appeal, is "limited to a reconsideration of the determination of heirship issue, a matter [over] which the [Department] does not lose jurisdiction." Appellant's Opening Br. at 6.<sup>6</sup> But as explained above, the IPJ had no independent jurisdiction over the parties, separate and apart from her probate jurisdiction over trust property, and when the property that was in Decedent's estate passed out of trust, the Department *did* lose jurisdiction over ancillary matters involving the probate of that estate.

In her final jurisdictional argument, Appellant asserts that:

[T]here may remain potential trust property under the [Department's] ongoing jurisdiction in the form of future distributions from the Individual Indian [Money [a]ccounts] for [Decedent] and [Decedent's deceased sister]. Moreover, there are potential future distributions through these [IIM] accounts or otherwise from the settlement of *Cobell v. Norton*, 428 F.3d 1070 (D.C. Cir. 2005).

*Id.* at 8.

Appellant produces no evidence in support of her contentions that trust personalty in Decedent's estate might yet be identified, and the record before the Board contains no

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(...continued)

. . . . Nothing in the regulations specifically authorizes [ALJs] to determine the Indian status of individuals when such a determination would have no bearing on the title status of property in an Indian estate but only upon the rights of the individuals, or their descendants, to apply for tribal membership. . . .

. . . .

The Board concludes that it erred in *Bert* and *Dupoint* in recognizing any authority in [ALJs] to make Indian status determinations where no probate function of the Department of the Interior is served thereby. 32 IBIA 108, 113-15 (1998).

<sup>6</sup> Appellant's reliance of *Estate of George Dragswolf, Jr.*, 30 IBIA 188 (1997), *see* Opening Br. at 7, is misplaced because only a *portion* of the estate in that case had gone out of trust.

evidence to suggest that Appellant's argument is more than speculation. And such speculation is not sufficient to establish probate jurisdiction for purposes of considering Appellant's petition for reopening at this time.

Because Appellant has not met her burden of showing that the IPJ's denial of reopening was in error, because Decedent's trust real property has passed out of trust status, and because there is no evidence that Decedent's trust estate now includes any trust personalty which has yet to be distributed, we affirm the IPJ's denial of reopening because the Department no longer has probate jurisdiction over this case.

### Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Order Denying Reopening.

I concur:

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// original signed  
Scott K. Fukumoto  
Acting Administrative Judge

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//original signed  
Steven K. Linscheid  
Chief Administrative Judge